

JONG SET FAH (F) (ADMINISTRATRIX OF THE ESTATE OF
LIM SAY KAW @ LIM WHO CHAI (DECEASED)

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v.

ASIA LIFE ASSURANCE SOCIETY LTD.

HIGH COURT SABAH & SARAWAK, KUCHING

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DATO' HJ. ABDUL KADIR SULAIMAN J

[CIVIL APPEAL NO. KG. 35 OF 1994(II)]

8 JANUARY 1996

INSURANCE LAW: *Life insurance - Death of policyholder - Claim on policy - Insurers denying liability for non-disclosure of material facts - Whether non-disclosure sufficiently proved.*

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EVIDENCE: *Insurance claim - Denial of liability for non-disclosure of material facts - Photocopy of medical report tendered under s. 73A Evidence Act 1950 - Whether report admissible as "a continuous record" - Failure to call maker - Effect - Typewritten statement of plaintiff tendered under s. 65(1)(c) Evidence Act 1950 - Secondary evidence - Whether Sessions Judge erred in giving weight to the evidence.*

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Upon the death of her husband, the plaintiff as administratrix of the deceased policyholder's estate sued the defendant insurer for the the sum insured, bonus accruing and interest. The defendant denied liability to pay on the ground of non-disclosure of material facts by the deceased at the time of entering into the contract of insurance on 1 October 1985. The denial was based on a medical report (D2) submitted to the defendant on 9 September 1985 in which the doctor assigned by the defendant to examine the deceased had stated there was nothing abnormal. However, the defendant received another medical report (D3) subsequent to the death of the deceased which disclosed that the deceased had been diagnosed with hepatocellular carcinoma since June 1985.

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The defendant relied on s. 73A of the Evidence Act 1950 (the Act) to admit D3 and submitted that the doctor who prepared the report could not attend as the Singapore General Hospital would not release him and no subpoena was issued as Singapore was outside the jurisdiction. The alleged letter from the Singaport Hospital citing confidentiality of patient information was also not tendered into Court. The learned Sessions Judge admitted D3, being satisfied that the defence had taken reasonable steps to secure the doctor's attendance and on the ground that she believed that the certified medical report had been made in the performance of a duty and was kept as part of the hospital records.

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The defendant also sought to tender a document containing a statement given by the plaintiff to the loss adjusters (P4) which testified to the fact that her husband, the deceased, was a regular smoker. This was contrary to the

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- a* statement by the deceased in D2 where he denied that he was a smoker. Only the typewritten copy of P4 was tendered but it was admitted under s. 65(1)(c) of the Act as the plaintiff did not object to it.

- b* The learned Sessions Judge concluded that the deceased had been aware of his illness at the time of entering the contract and as such held that there had been suppression of material facts which made the contract voidable. She accordingly dismissed the plaintiff's claim with costs. The plaintiff appealed to the High Court. The question was whether the Sessions Judge erred in admitting D3 and in giving weight to P4.

c **Held:**

- d* [1] There is no evidence before the Court that D3 came from a file or if it was specifically made for a purpose. Even if it is part of a file it is not automatically to be assumed that the report contained therein can qualify under the phrase "continuous record" and even if D3 can be treated as part of a continuous record, it is still incumbent upon the defendant to satisfy the Court that the relevant doctor was acting in the performance of a duty to record.

- e* [2] The reasons for the doctor's absence as a witness are unacceptable for the purpose of the proviso to s. 73A(1) of the Act. The mere fact that the doctor cannot be released by the hospital cannot be an excuse for not calling him to testify. If proper steps are taken a witness subpoena can be issued to a witness in Singapore to appear in Court in Malaysia to give evidence. On the confidentiality aspect, it is for the Court to decide whether certain facts need not be disclosed. Therefore, the learned Judge had erred in admitting the document under the said section as exhibit D3.

- f* [3] P4 is only secondary evidence under s. 63(c) of the Act and as such may only be admitted under the circumstances stated in s. 65(1) including where the original has been destroyed or lost but there was no testimony from the defendant to that effect.

- g* [4] The plaintiff was not referred to P4 at all and as such was not given an opportunity to explain the alleged misrepresentation by her in P4 nor to explain the contradiction in her testimony in Court. In the circumstances, the Judge ought not to have given any weight to the plaintiff's statements in P4.

- h* [5] A contract of insurance is a contract *uberrimae fidei*. Notwithstanding, there ought to be clear evidence that the deceased knew or ought to have known that at the time of entering into such a contract he had not disclosed some material facts which would have an effect on the contract
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that he entered into. The defendant had not discharged its burden on the balance of probability to avoid its liability on the policy of insurance. *a*

[Appeal allowed with costs]

Cases referred to:

Thrasyvoulos Ioannou & Ors. v. Papa Christoforos Demetrious & Ors. [1952] 1 All ER 179 (foll) *b*

Re Koscot Interplanetary (UK) Ltd. [1972] 3 All ER 829 (foll)

London General Omnibus Co. Ltd. v Holloway [1912] 2 KB 72 (refd)

Legislation referred to:

Evidence Act 1950, ss. 63(c), 65(1), (i), (c), 73A, (1), (4) *c*

Evidence Law (Cyprus), s. 4, (1)(a)(ii)

Insurance Act 1963, s. 16(4)

Evidence Act 1968 (UK), s. 1(1)(i)(b)

For the appellant - H.C. Sim; M/s. Reddi & Co., Kuching

For the respondent - Baxter Michael; M/s. Ee & Lim, Kuching *d*

JUDGMENT

Abdul Kadir Sulaiman J:

The plaintiff as administratrix of the deceased life policyholder sued the defendant insurers for a sum of RM100,000 being the amount insured, bonus accruing therein and interests, upon the death of her husband, Lim Say Kaw, the policyholder. The deceased died on 8 June 1986. The said policy effective from 1 October 1985 is at p. 85 of the record of appeal and had named her as the beneficiary. The defendant denied the liability to pay on the ground of non-disclosure of certain material facts by the deceased assured at the time of entering into this contract of insurance. *e*

Before the learned Sessions Judge, the only issue for the determination is the said allegation by the defendant. If proved, it would render the policy void as against the defendant. At the end of the trial, the learned Judge was satisfied that the defendant has proved on the balance of probability that there was a suppression of material facts which would render the contract of insurance voidable at the option of the defendant. She, therefore, disallowed the plaintiff's claim and ordered costs to be paid to the defendant to be taxed unless agreed. The plaintiff being dissatisfied with the said decision now appeals to this Court. *f*

Altogether there are eight grounds of appeal but those grounds can be summarily taken under the ground that the learned Judge was wrong in admitting exhibit D3 and in relying on exhibit P4 in holding that at the time of the contract the deceased assured knew or ought to have known that he was suffering from liver cancer and that he was a smoker. Therefore, in not disclosing the said information to the defendant at the time, the contract was *g*

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- a* void. Exhibit D3 is the medical report on the assured obtained after the death of the assured and exhibit P4 is a statement recorded from the plaintiff when making the claim on the policy.

- b* From the evidence gathered in the Court below, DW1, senior executive officer of the defendant received from the plaintiff the claim on the policy upon the death of the assured. After processing the claim, the defendant decided to reject it due to alleged suppression of material facts by the assured. This is borne from the fact that on 9 September 1985 the assured submitted to the defendant exhibit D2 which is the medical examiner's report of the same date prepared by the doctor instructed by the defendant to examine the assured.
- c* The following day, 10 September 1985, the assured filled up the application form for the policy which is exhibit D1. From exhibit D2 there was nothing abnormal for the defendant to question further and that the assured had satisfied the condition for the issuance of the policy to him. So the life assurance applied for by the deceased assured was recommended. However,
- d* subsequently after the death of the assured, the defendant received a medical report, exhibit D3 dated 2 January 1987, disclosing that the assured had hepatocellular carcinoma which was first diagnosed in June 1985, which was before the date of the insurance contract. For its importance I append below the content of exhibit D3:

- e* **Singapore General Hospital**

Your ref: MR 9737/86

2 January 1987

- f* The Medical Director
Singapore General Hospital
Singapore 0316

Through: Head, University Department of Medicine

- g* **Re: Lim Say Kaw KE 0263154**

The above named had hepatocellular carcinoma which was first diagnosed in June 1985. He was given 5 courses of Intrahepatic Lipoidal Chemotherapy. He developed malignant pleural effusion in December 1985 for which intrapleural chemotherapy was instituted.

- h* He was admitted from 7.4.1986 to 20.4.1986, for terminal care. Clinical examination then showed that he was cachectic, pale and jaundiced. He had bilateral ankle oedema, right pleural effusion, gross ascites and tender enlarged liver.

- i* He was given supportive and symptomatic treatment including another course of intrahepatic chemotherapy. He showed some improvement on discharge. He defaulted from follow up.

Sgd...

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Dr. Lim Shih Hui
Medical Officer
University Department of Medicine

Hence, the defendant contended that the assured had not disclosed this fact at the time of the entering into this contract of insurance. If the said illness was disclosed the defendant would have asked for further medical report or it would have rejected the application of the assured for the insurance cover. The assured died of hepatocellular carcinoma in June 1986.

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In the Court below, there was a tussle over the tendering of exhibit D3 which the learned Judge ultimately admitted it as evidence being a public document. The medical officer who prepared the exhibit was not called as a witness in the trial as he was not issued with a subpoena. According to the learned Counsel for the defendant the said medical officer could not attend Court as he was not released by the Singapore General Hospital. A subpoena was not issued requiring his presence because Singapore is out of the jurisdiction. Letter from the General Hospital said that their staff are bound to protect the confidentiality of patient's information. However, the said letter was not produced as evidence. So the defence is relying on s. 73A of the Evidence Act 1950, (hereinafter referred to as "the Act") for the admissibility of exhibit D3. The learned Counsel for the plaintiff objected and contended that s. 73A thereof would not apply in this case. Similar arguments were advanced by both sides in their arguments during this appeal. In her judgment at p. 61 of the record, the learned Judge states that she is satisfied that the defence had taken reasonable steps to secure the attendance of the medical officer who could not be released owing to the policy of the hospital to safeguard the confidentiality of their patients. Since the report was certified, in the view of the learned Judge, it is immaterial whether the writer was the doctor treating the assured, it being a medical report, she believes that it was made in the performance of duty and is kept in the hospital record.

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At p. 73 of the record the judgment of the learned Judge goes on to conclude that it is very clear from exhibit D3 that the assured knew and ought to have known that he had cancer in the liver yet he failed to disclose it to the medical examiner. The issue, therefore, is whether the learned Judge was right in admitting exhibit D3 to support the evidence for the defendant. Under s. 73A of the Act, the admissibility of documentary evidence such as exhibit D3 in civil proceedings, is subjected to various stringent conditions. Firstly, by subsection (4) the statement made by a person in a document for purpose of subsection (1) must have been written, made or produced by the person with his own hand, or was signed or initialed by him, or otherwise recognised by him in writing as one for the accuracy of which he is responsible. Though there was a signature on the document, but there is no evidence to suggest that the signature belongs to the author. Since, this exhibit was objected to by

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- a* the plaintiff, everything is in issue and it is for the defendant, therefore, to establish by evidence that every requirement of the subsection is complied with before it can be taken to mean “any statement made by a person in a document” for the purpose of subsection (1) thereof. Then, that is not all the conditions necessary to be established. The so-called statement must be
- b* contained in the original document itself, which in this case is not. It is only a photocopy. It is chopped at the bottom with the words “Certified Official”. The document is addressed to the Medical Director, Singapore General Hospital which said certificate was endorsed on his behalf. Next is the requirement that the purported statement must have been made by a person having personal
- c* knowledge of the matters dealt with by the statement or if not so, the document in question is one or forms parts of a record purporting to be a continuous record and the maker of the statement does so in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters, and that the maker of the statement is called as a witness in the proceedings.
- d* The evidence in regard to this aspect of the matter is lacking here. The doctor in question was not called as a witness at all in the proceedings before the learned Judge in the Court below. There is nothing in the evidence to indicate that the author of this document was a personal doctor of the deceased or that it is in respect of information supplied to him by another doctor who had
- e* personal knowledge of the matter. On the issue of whether the said document is one or forms parts of a record purporting to be continuous record, there is no evidence before the Court that this document came from a file or if it was specifically made for a purpose. The only thing that is clear is that it was directed for the attention of the Medical Director of Singapore General
- f* Hospital. Even if it is part of a file it is not automatically to be assumed that the report contained therein can qualify under the phrase “continuous record” as the case of *Thrasyvoulos Loannou & Ors. v. Papa Christoforos Demetrious & Ors.* [1952] 1 All ER 179 would show. In that case the Privy Council was called upon to interpret s. 4 of the Evidence Law of Cyprus which
- g* section is in *pari materia* with s. 1(1)(i)(b) of the UK Evidence Act 1968, and with our s. 73A. The document sought to be tendered in that case is a report, made after an inquiry conducted by a surveyor who has since died, on the right of the respondent as ancient use of a River K. The report was kept in the Land Registry in a file containing a collection of reports on the said
- h* River K and the respondent contended that it was admissible as forming part of a continuous record within the meaning of s. 4(1)(a)(ii) of the Evidence Law of Cyprus. Lord Tucker, delivering the judgment of the Court held, in declaring the report inadmissible, that the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred
- i* subject matter did not necessarily make the contents of the file a continuous record within the meaning of the said section. Even if the report as contained in exhibit D3 can be treated as part of a continuous record, it is still incumbent

upon the defendant to satisfy the Court that Dr. Lim Shih Hui was acting in the performance of a duty to record. In *Re Koscot Interplanetary (UK) Ltd.* [1972] 3 All ER 829, Megarry J, at p. 834 said: **a**

I think that if a litigant wishes to put in hearsay evidence by virtue of s. 4(1) he must establish in some way that the requirements of the subsection are satisfied. It will be observed that the phrase 'may reasonably be supposed' governs only the requirement of personal knowledge, and that the other requirements are not softened in this way. Thus I do not see how a document can be shown to be, or to form part of, 'a record compiled by a person acting under a duty' unless there is some evidence of who that person was, and that he was subject to such a duty. **b**

However, the proviso to s. 73A(1) of the Act allows under certain circumstances stated therein for the non-calling of the doctor as a witness. The reason given by the learned Counsel for the defendant for the absence of the doctor as a witness was firstly because the witness cannot be released by the General Hospital in Singapore. Secondly, the subpoena was beyond reach in Singapore. Thirdly, the confidentiality of the patient's information to the doctor. In my view, these are all unacceptable reasons for the purpose of the proviso to s. 73A(1) of the Act to excuse the doctor from being called as witness in the proceedings. The mere fact tht the doctor cannot be released by the hospital cannot be an excuse for not calling him to be a witness to testify. If proper steps are taken a witness subpoena can be issued to a witness in Singapore to appear in Court in Malaysia to give evidence. On the confidentiality aspect it is for the Court to decide whether certain facts need not be disclosed. In the circumstances, the learned Judge had erred in admitting the document under the said section as exhibit D3 for the reason she provided in her judgment. She ought to have rejected the exhibit in the circumstances. Therefore, without this exhibit as a foundation for avoiding the policy taken up by the deceased assured, what is left in the evidence of DW1 is that on 9 September 1985, there was a report prepared by the appointed medical examiner of the defendant evidence by exhibit D2 and on 10 September 1985, the deceased assured applied for the insurance on his life which is evidenced by exhibit D1. At p. 29 of the Record the witness testified that from the report in D2 there was nothing abnormal for the defendant to question further as the exhibit shows that the applicant had satisfied the condition for an insurance on his life. However, that is not the end of the matter. The defendant is also relying on exhibit P4 tendered by the defence witness DW2 in support of its case that the policy issued to the deceased assured should be void for non-disclosure of material facts. Be it noted that exhibit P4 is not produced by the plaintiff but being marked as such. **c**

P4 is a document containing a statement purportedly given by the plaintiff to the Insurance loss adjuster, DW2 who was asked by the defendant to investigate into the cause of death of the assured upon receipt of the claim by the plaintiff. At that time DW2 was working with Thomas Howell Sdn. Bhd. a loss adjuster **d**

P4 is a document containing a statement purportedly given by the plaintiff to the Insurance loss adjuster, DW2 who was asked by the defendant to investigate into the cause of death of the assured upon receipt of the claim by the plaintiff. At that time DW2 was working with Thomas Howell Sdn. Bhd. a loss adjuster **e**

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P4 is a document containing a statement purportedly given by the plaintiff to the Insurance loss adjuster, DW2 who was asked by the defendant to investigate into the cause of death of the assured upon receipt of the claim by the plaintiff. At that time DW2 was working with Thomas Howell Sdn. Bhd. a loss adjuster **i**

- a* firm. However, at the time of giving evidence in Court, DW2 was no longer working with the firm but with Robin Davies (M) Sdn Bhd. It is not in evidence as to when he left Thomas Howell Sdn. Bhd. The statement was purportedly recorded on 21 November 1986 and does not bear the actual signatures of the plaintiff and DW2. It is typewritten and according to DW2
- b* it was copied by his staff from the original which was said to be handwritten. After the typing he checked the contents and found it be correct. The original was not tendered. According to DW2 the original could not be obtained because the file containing the document could not be located. He went further to make a bare statement that the adjuster firm by its practice, only keeps
- c* the files for 5 years after which they would be destroyed. No one from the adjuster firm testified to that fact. According to the learned Counsel for the defendant, the tendering of this typewritten copy was done pursuant to s. 65(1)(c) of the Act. The learned Judge admitted it presumably because the plaintiff did not object to its admission. Be that as it may under s. 63(c) of
- d* the Act the document is a secondary evidence. Under s. 65(1) of the Act, that secondary evidence may be given of its existence, condition or contents admissible in evidence under varying circumstances laid out in the sub-section. One of the circumstances is as stipulated under para. (c) wherein the original has been destroyed or lost. The plaintiff herself gave evidence at the trial but she was not referred to this exhibit at all. However, in cross-examination she
- e* was asked one question that is whether she did ever tell the insurance adjuster that her husband smoked regularly ever since they got married, to which she denied. She was never asked at all whether she gave a statement to the adjuster as is contained in exhibit P4.
- f* The statement in P4 is lengthy comprising of questions and answers. One of the questions asked is "Did your husband smoke regularly? She purportedly to have answered: "Yes, he smoked regularly ever since we were married." The defendant relies heavily as well on this answer because in the deceased's statement to the medical examiner exhibited as D2, to the question: "What form of tobacco do you use and state amount daily consumed?" the deceased
- g* answered "No" suggesting that he was not a smoker. In the light of exhibit P4 the defendant is contending that the deceased had misrepresented certain material facts which would entitle it to avoid the liability on the policy. This is a very serious matter indeed. The assured is dead to explain. On the purported statement of the plaintiff in exhibit P4 he is to be condemned and the plaintiff
- h* is to suffer. The statement in the exhibit is not recorded on oath from the plaintiff and at the trial she was not even given the opportunity to explain on the existence of the exhibit. I bear in mind that the contract of insurance is a contract *uberrimae fidei*. That notwithstanding, there ought to be clear evidence that the deceased assured knew or ought to have known that at the time of
- i* entering into such a contract he had not disclosed some material facts which would have an effect on the contract that he entered into.

In *London General Omnibus Co. Ltd. v. Holloway* [1912] 2 KB 72, Kennedy LJ, observed: a

No class of case occurs to my mind in which our law regards non-disclosure as invalidating the contract, except in the case of insurance. That is an exception which the law has wisely made in deference to the plain exigencies of this particular and most important class of transactions. The person seeking to insure may fairly be presumed to know all the circumstances which materially affect the risk, and, generally, is, as to some of them, the only person who has the knowledge; the underwriter, whom he asks to take the risk, cannot, as a rule, know and but rarely has either the time or opportunity to learn by enquiry, circumstances which are, or may be, most material to the formation of his judgment as to his acceptance or rejection of the risk, and as to the premium which ought to be required. b
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It is with this special requirement of *bona fide* in mind that our legislature deemed it fit to enact s. 16(4) of the Insurance Act 1963.

However, having carefully weighed the matter before me now, I do not think the evidence so available at the trial on this issue is sufficient to hold that the deceased had in fact misrepresented material facts. In the circumstances, the learned Judge ought not to have given any weight to such statement as so given by the plaintiff in exhibit P4 to allow the defendant to avoid the liability on the policy taken up by the deceased during his lifetime to the detriment of the plaintiff as the beneficiary of the interest in the said policy. d
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Therefore, for the reason stated above, I am of the view that the defendant had not discharged its burden on the balance of probability to avoid its liability on the policy of insurance. I would therefore, allow the appeal of the plaintiff against the decision of the learned Judge. I, therefore, reverse the decision of the learned Judge and instead allow the claim of the plaintiff for: f

- (a) the sum of RM100,000
- (b) bonus accruing on the policy to be assessed by the Senior Assitant Registrar, unless agreed; g
- (c) interest on items (a) and (b) above at 8% per annum from the date of the judgment to the date of final settlement; and
- (d) Costs here and below to be taxed, unless agreed. h

Reported by Leong Mun Yin

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